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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION THREE

ALBERT MONTISANO, Plaintiff and Appellant, v. SAN MATEO COUNTY EMPLOYEES RETIREMENT ASSOCIATION, Defendant and Respondent.	A141076 (San Mateo County Super. Ct. No. CIV522614)

Albert Montisano appeals from a judgment of dismissal after the court sustained defendants San Mateo County Employees' Retirement Association's (SamCERA) and Board of Retirement's (the Board) demurrer to his petition for a peremptory writ of mandate under Code of Civil Procedure section 1085 without leave to amend. Montisano contends the court should have permitted him to amend his petition to plead facts demonstrating the Board has a clear ministerial duty to reconsider its 1989 decision awarding him a non-service-connected disability retirement. Not so. The court correctly concluded the Board is legally unauthorized to reconsider its decision, so we affirm.

BACKGROUND

Montisano started working as a communication technician for the County of San Mateo in October 1974. During his employment he developed rheumatoid arthritis, and had to stop working in 1987. He applied for a non-service-connected disability retirement in March 1988. The Board granted his application on February 9, 1989.

As alleged in Montisano's petition, service-connected disability retirement is eligible for a tax exemption of up to 50 percent of the retiree's final compensation, while non-service-connected disability retirement is not. Montisano alleged that SamCERA personnel erroneously advised him the two retirement options have the same tax consequences and that he applied for and was granted a non-service-connected disability retirement in reliance on that advice.

A SamCERA administrator wrote to Montisano in 1991 to "verify" that, "[a]ccording to the information I have," Montisano's disability retirement income allowance "is only taxable above 50% of your regular employment salary when you worked for the County. You are receiving less than 50% of your regular salary and therefore the income should not be taxable." However, the letter cautioned, "Remember to consult a tax advisor in these matters as the County does not give tax advi[c]e." The letter, dated February 7, 1991, is incorporated into Montisano's petition as an exhibit.

Montisano further alleged that he only learned in 2008, when the IRS notified him he owed back taxes, that SamCERA had misadvised him about the tax consequences of his pension. In 2011, Montisano asked the Board to retroactively convert his non-service-connected disability to service-connected disability retirement because of the allegedly incorrect tax advice he had been given or to reconsider his case "for the purpose of establishing his right to a service-connected disability retirement." The Board denied his requests on the ground that its 1989 decision was long since final and it lacked legal authority to reconsider or reopen the matter.

Montisano filed a claim for damages under the Tort Claims Act, which was rejected as untimely. He then filed this petition for a peremptory writ of mandamus. The Board demurred on the ground, inter alia, that the petition failed to state facts sufficient to establish a clear, present and ministerial duty to grant the requested relief. The court sustained the demurrer without leave to amend. Montisano timely appealed from the ensuing judgment.

DISCUSSION

I. *Legal Standards*

"On review from an order sustaining a general demurrer, ' "[w]e treat the demurrer as admitting all material facts properly pleaded, but not contentions, deductions or conclusions of fact or law. [Citation.] We also consider matters which may be judicially noticed." [Citation.] Further, we give the complaint a reasonable interpretation, reading it as a whole and its parts in their context. [Citation.] When a demurrer is sustained, we determine whether the complaint states facts sufficient to constitute a cause of action. [Citation.] And when it is sustained without leave to amend, we decide whether there is a reasonable possibility that the defect can be cured by amendment: if it can be, the trial court has abused its discretion and we reverse; if not, there has been no abuse of discretion and we affirm. [Citations.] The burden of proving such reasonable possibility is squarely on the plaintiff.' " (*Stanton Road Associates v. Pacific Employers Ins. Co.* (1995) 36 Cal.App.4th 333, 340–341.)

"A writ of mandate may be issued by any court . . . to compel the performance of an act which the law specially enjoins, as a duty resulting from an office, trust, or station . . . ." (Code Civ. Proc., § 1085, subd. (a).) The petitioner must show that there is no other plain, speedy and adequate remedy; that the public official or entity had a ministerial duty to perform; and that the petitioner has a clear and beneficial right to performance. (*Transdyn/Cresci JV v. City and County of San Francisco* (1999) 72 Cal.App.4th 746, 752.) "Whether, in a particular case, the writ should issue, lies, to a considerable extent, in the discretion of the court to which the application is made. [Citations.] The right to the writ must be clear and certain [citation], and mandamus may not be resorted to as the substitute for an adequate legal remedy. [Citations.] The purpose of the writ in this state, as at common law, is to prevent a failure of justice." (*Irvine v. Gibson* (1941) 19 Cal.2d 14, 15–16.)

II. *Statutory Framework for Disability Retirement*

Under the County Employees Retirement Law of 1937 (CERL) (Gov. Code, § 31450 et. seq.), [1] a permanently incapacitated member of a county employees' retirement association may apply for retirement regardless of age if the incapacity "is a result of injury or disease arising out of and in the course of the member's employment, and such employment contributes substantially to such incapacity" (§ 31720, subd.(a)), or if the member has completed five years of service and has not waived retirement in respect to the incapacity (§ 31720, subds. (b), (c)). These two options are respectively referred to as service-connected and non-service-connected disability retirement. A member who applies for service-connected disability retirement has the burden of showing that the disability was caused by his or her employment. (*Glover v. Board of Retirement* (1989) 214 Cal.App.3d 1327, 1337; *Valero v. Board of Retirement of Tulare County Employees' Assn.* (2012) 205 Cal.App.4th 960, 966.)

III. *Analysis*

The trial court correctly determined the Board is not authorized to reconsider its 1989 decision to award Montisano a non-service-connected disability or allow him to reapply for a service-connected disability retirement, the sole relief sought in his petition. *Gutierrez v. Board of Retirement* (1998) 62 Cal.App.4th 745 (*Gutierrez*) is dispositive. There, as in this case, a county employee requested and received non-service-connected disability retirement. After his death, his widow sought a writ of mandate to compel the county retirement association to grant her service-connected survivor benefits, or to at least permit her to apply for service-connected survivor benefits. The trial court granted her petition. (*Id.* at p. 747.)

The court of appeal reversed. It explained that CERL authorizes the county to grant either service-related or non-service-related disability retirement, depending on whether the disability arose from and in the course of the employee's employment and the employment " 'contribute[d] substantially' " to the disability. (*Gutierrez, supra*, 72

[1]Unless otherwise specified, further statutory citations are to the Government Code.

Cal.App.4th at p. 748.) But the authorizing statute, section 31722, "is not ambiguous or unclear. It permits an application for disability benefits to be made at three different times, none of which apply to the time at which Mrs. Gutierrez attempted to apply for revised death benefits. *Section 31722 does not permit a late application for one kind of disability retirement after the other kind has been applied for and received (or at any time). It has no 'delayed discovery' provision*." (*Ibid*., italics added.) "Unless authorized by statute, an administrative agency acting in an adjudicatory capacity (as LACERA does when it decides whether to grant disability retirement benefits) may not in any event reconsider or reopen a decision. [Citations.]" (*Id.* at p. 749, fn. 3.)

In light of the clear statutory language, *Gutierrez* held that principals of equity did not allow the trial court to read into CERL a provision that would permit the belated conversion of non-service-related benefits to service related benefits. "[I]t is not the job of the courts to expand the scope of retirement benefits created by the Legislature and spelled out in a detailed statutory scheme." (*Gutierrez, supra*, 72 Cal.App.4th at p. 749, citing *Napa Valley Wine Train, Inc. v. Public Utilities Com.* (1990) 50 Cal.3d 370, 381 [courts are not authorized to insert qualifying provisions not included in statutes " 'and may not rewrite the statute to conform to an assumed intention which does not appear from its language' "]; *Huening v. Eu* (1991) 231 Cal.App.3d 766, 779 [courts may not rewrite statutes to achieve what might be considered a more rational result].) " 'To be valid, administrative action must be within the scope of authority conferred by the enabling statutes.' " (*US Ecology, Inc. v. State of California* (2001) 92 Cal.App.4th 113, 131.)

So, too, here. As in *Gutierrez,* SamCERA is without statutory authority to reconsider or reopen Montisano's retirement application more than 20 years after it awarded his retirement. Accordingly, Montisano cannot allege the Board has a "clear, present, and usually ministerial duty to perform," or that he has a "clear, present, and beneficial right to the performance of that duty," as required for a petition under Code of Civil Procedure section 1085. (*Marvin Lieblein, Inc. v. Shewry* (2006) 137 Cal.App.4th 700, 713; see also *Coachella Valley Unified School Dist. v. State of California* (2009)

176 Cal.App.4th 93, 113 [“A ministerial act is one that a public functionary ‘ “ ‘is required to perform in a prescribed manner in obedience to the mandate of legal authority,’ ” ’ without regard to his or her own judgment or opinion concerning the propriety of such act”].)

Medina v. Board of Retirement (2003) 112 Cal.App.4th 864 (*Medina*) underscores our conclusion. There, the Los Angeles County Employees Retirement Association (LACERA) misclassified certain employees as safety members rather than general members over a period of 10 years, during which it collected retirement contributions and disseminated annual benefits statements based on the erroneous classifications. Because they were classified as safety members, the affected employees paid contributions at a higher level and received annual statements reflecting a higher retirement benefit than general members. (*Id*. at pp. 867–868.) After LACERA discovered the error and retroactively reclassified the affected employees as general members, the employees filed a petition for writ of mandate asserting the association was estopped to take that action.

The court of appeal affirmed the denial of their petition. Although equitable estoppel has been asserted against the government in the area of public employee pensions under some circumstances, the court observed, “ ‘[i]n each of these instances the potential injustice to employees or their dependents clearly outweighed any adverse effects on established public policy. *However, no court has expressly invoked principles of estoppel to contravene directly any statutory or constitutional limitations.* [Citations.]’ [Citation.] [¶] The latter point is critical here: principles of estoppel may not be invoked to directly contravene statutory limitations.” (*Medina, supra*, 112 Cal.App.4th at p. 869.) Nor, likewise, may a retirement association’s undisputed fiduciary duty to its members and retirees support a remedial action concerning the award of disability retirement that is not expressly authorized by statute. (*Chaidez v. Board of Administration of California Public Employees’ Retirement System* (2014) 223 Cal.App.4th 1425, 1431 [“The constitutional mandate by which PERS operates does not include an overlay of fiduciary obligations justifying an order to pay greater benefits than the statutes allow”]; *City of Pleasanton v. Board of Administration* (2012) 211 Cal.App.4th 522, 544.)

Montisano argues that sections 31540 and 31541 provide statutory authority for the Board to reopen and reconsider his retirement application, but they do not. Section 31540 provides that the "obligations of the retirement system to its members continue throughout their respective memberships, and the obligations of the retirement system to, and in respect to, retired members continue throughout the lives of the retired members, and thereafter until all obligations to the members' beneficiaries under optional settlements have been discharged." (§ 31540, subd. (a).) Section 31541 concerns the power of a county retirement board to correct errors or omissions of its members resulting from mistake, inadvertence, surprise, or excusable neglect. (§ 31541, subds. (a)-(c).) But both statutes expressly apply only to counties "of the first class" (§§ 31540, subd. (f), 31541, subd. (f)), defined as those counties with populations of 4,000,000 and over—which, in effect, consists only of Los Angeles County. (§§ 28020, 28022.) San Mateo is a county of the *10th* class (§§ 28020, 28031), so sections 31540 and 31541 have no legal effect on defendants and cannot impose a mandatory duty on them.

Montisano also asserts that *Hittle v. Santa Barbara County Employees Retirement Assn.* (1985) 39 Cal.3d 374 (*Hittle*) provides a common law basis for compelling the Board "to correct its mistakes, where an Applicant makes an uninformed decision based on inadequate or incorrect counseling by his fiduciary." Here, too, we disagree. The issue in *Hittle* was whether substantial evidence supported an administrative finding that an employee knowingly waived his right to apply for disability retirement when, without having been informed he could be eligible and believing that he was not, he withdrew his retirement contributions upon termination of his employment. (*Id.* at pp. 380, 389–394.) The court found there was no evidence of a knowing waiver, and, therefore, that Hittle's withdrawal of his contributions could not be deemed a valid waiver of his right to apply for disability retirement. (*Id.* at pp. 388–389.) But *Hittle* does not address whether the retirement association had statutory authority to grant the relief sought, and "[a]n opinion is not authority for a point not raised, considered, or resolved therein." (*Styne v. Stevens* (2001) 26 Cal.4th 42, 57.)

Gutierrez, *Medina*, and *Chaidez*, not *Hittle*, provide the controlling law here. Pursuant to the principles they express, the trial court correctly denied Montesano's petition for writ of mandate without leave to amend.

DISPOSITION

The judgment is affirmed.

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Siggins, J.

We concur:

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McGuiness, P.J.

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Jenkins, J.